IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAM MAIN REGISTRY

MISC. CIVIL. APPEAL NO. 3 OF 2017

(CORAM: TEEMBA, MUTUNGI, ARUFANI, JJJ)

(Originating from Application no. 10 of 2014 In The Matter of the Advocates Committee)

NATHAN ALEX ..... APPELLANT

VERSUS

VALERIAN CRISPIN MLAY .....1st RESPONDENT
THE ADVOCATES COMMITTEE ..... 2nd RESPONDENT

JUDGMENT OF THE COURT

TEEMBA, J.

On 12/5/2014, **Velerian Crispin Mlay**, the first respondent wrote a complaint letter addressed to the Chairman of the Advocates Committee complaining against **Nathan Alex**, for professional misconduct. In order to appreciate the grounds of appeal and the arguments from both sides, we will summarize the facts as recorded by the Advocates Committee. **Velerian Crispin Mlay** was an ex-employee of Kagera Tea Company Limited (KTC) and the two had a labour dispute on the retirement benefits. The first respondent engaged the appellant, **Nathan Alex**, an Advocate of HAKI

Attorneys to represent him in the Commission for Mediation and Arbitration (CMA) and in the High Court. The CMA decided the dispute in favour of the first respondent and awarded him Tshs 142, 101, 799.21 KTC appealed to the High Court, Labour Division where the amount was raised to Tshs 269, 371, 799.21. An attempt to lodge an appeal to the Court of Appeal failed. KTM sought for a settlement out of court and finally agreed to pay the first respondent a total amount of Tshs 65,000,000/= as final and conclusive in the claim. Though hesitantly, the second respondent accepted the proposal that the money would be paid through his lawyer, the appellant, in four instalments of Tshs 15,000,000/= by March 2014; Tshs 17,000,000/= by April 2014; Tshs 17,000,000/= by May 2014; and Tshs 16,000,000/= by June 2014. According to the first respondent, The first two instalments amounting to Tshs 32,000,000/= were paid through the appellant's account. When he contacted the appellant in respect of the said payment the latter refused to talk about it. Todate, and because of this bad relationship, the ex-employer has not paid the remaining sum. The first respondent complained to the High Court, Labour Division and an order was issued to compel the ex-employer to pay the remaining sum. As a result of that order, the appellant filed a civil suit no. 18 of 2014 in the Resident Magistrates' Court of Kagera at Bukoba

against the first respondent claiming for Tshs 39,300,000/= as his legal fees. The appellant also obtained an interim order to stop the payments to the first respondent irrespective of the execution order by the labour Court. At the time of hearing this appeal, the suit at Bukoba Resident Magistrates' Court was still pending.

In his defence before the Advocates Committee the appellant admitted that he represented the first respondent in the CMA and High Court. He alleged that his client had agreed to pay shs, 40,000,000/= as legal fees but after the settlement between KTM and the first respondent, the client refused to discuss the legal fees and instead he maintained that the appellant was entitled to only Tshs 8,000,000/=. The appellant also admitted to have lodged a civil suit against the first respondent claiming for legal fees of Tshs 39,300.000/. The appellant alleged that Shs 32,000,000/= paid to him was received from Bukoba Tea Blenders (BTB) for legal expenses as the company was his client since 05/1/2014 in another dispute involving tea farmers. He admitted that his retainer fee was shs 6,000,000/= but he was overpaid. However, neither BTB nor the appellant has informed the other side in writing that the appellant was overpaid. Moreover, the appellant did not call any witness from BTB to support his

allegation that the payment was for legal services rendered to the company.

The Advocates' Committee found the appellant guilty and convicted him of professional misconduct. The Committee also suspended him from practice for five years and condemned him to pay costs of that application. Being aggrieved by the decision and order of the Advocates' Committee, the appellant has appealed to this court on the following nine grounds:

That, the trial Advocates Committee erred in law and facts to hear and determine the application while the Committee was not properly moved.

2. That, the proceedings before the Advocates Committee were irregular and null and void for failure to comply with the requirements and procedures under Rule 3 of the Advocates (Disciplinary) Rules, GN No. 135.

3. That, the Ruling of the Committee is irregular and bad in law for being not signed by the Chairman.

4. That, the proceedings before the Advocates Committee was nullity for action of drawing issues at the stage of composing the Ruling.

5. That, the trial Committee grossly erred in law and facts for failure to afford the Appellant full right to be heard on the issues framed by the Committee while composing the Ruling.

6. That, the proceedings, Ruling and decision of the Advocates Committee are bad in law for being in violation of rules and principles of natural justice.

7. That, trial Committee erred in law and facts for convicting the Appellant on professional misconduct while the same was not proved to the required standard of proof.

8. That, the Advocates Committee erred in law and facts for failure to evaluate and weigh up evidence before it to the mandatory standards.

9. That, generally the orders and punishment against the Appellant was excessively punitive without regards to the nature of purported misconduct.

Before this Court, the appellant was represented by Mr Revocatus Thadeo, learned advocate while the second respondent was represented by Mr. Mwitasi, learned Senior State Attorney. The first respondent appeared in person.

In arguing the appeal, Mr Thadeo abandoned ground number 3. He argued grounds no. 1 & 2 jointly stating that the Committee was not properly moved and thus, the proceedings were also irregular for failure to comply with the requirements of Rule 3 of the Advocates (Disciplinary) Rules, GN No. 135 of 1955 which requires a complaint to be addressed to the secretary of the Committee. He submitted that the record of the Committee reveals at page 2 of the proceedings that when the Committee sat for the first time, it was moved by a letter from the first respondent and it ordered a formal application to be brought. The learned advocate added that, this that was wrong as the Committee was supposed to strike out that application instead of asking for a new application. He also submitted that the Committee acted wrongly on the second application because even this one was not addressed to the Secretary as stipulated under Rule 3. To support his argument that the proceedings were null and void, the learned counsel made reference to the case of **RUTAGATINA C.L. Vs The ADVOCATES COMMITTEE and CLAVERY MTINDO NGALAPA, Civil Appeal No. 46 of 2012, Court of Appeal**, (Unreported).

In his reply, the first respondent was firm that his complaint was proper before the Committee after bringing

the formal complaint as ordered by the Committee. He submitted that his complaint was supported by an affidavit and documents.

Mr Mwitasi, learned Senior State Attorney, submitted that these two grounds of appeal have no merit. He challenged the appellant by arguing that the grounds ought to be preliminary objections which could be dealt with at the early stages of hearing by the Committee. He submitted that, as long as these are not addressing the jurisdiction of the Committee or limitation period, they cannot be acted upon in this appeal. To reiterate his point, The learned State Attorney cited the case of **Tanzania-China Friendship Textile Co.Ltd Vs Our Lady of Usambara Sisters [2006] T.LR.70.**

Alternatively, the learned counsel argued that if this court agrees with the appellant that the application was wrongly filed still there is no harm committed by the Committee because there was an application in place which was supported by an affidavit as required by Rule 3 of the Advocates (Disciplinary) Rules, GN no. 135 of 1955. He therefore distinguished the case of **Rutagatina** (supra) from the present appeal on the ground that the former had neither application nor affidavit before the Committee. In addition, he submitted that the rules of procedure should not

be applied strictly in this case as applied strictly in criminal cases.

In order to appreciate the arguments on these grounds of appeal, let us reproduce the wording of Rule 3 of the Advocates (Disciplinary and Other Proceedings) Rules GN no. 135 of 1955. The Rule states:

> *"3. An application to the Advocates Committee to remove the name of an advocate from the Role or to require an advocate to answer allegations shall be in writing under the hand of the applicant in Form 1 set out in the Schedule and shall be sent to the Secretary to the Committee together with an affidavit by the applicant stating the matters of fact on which he relies in support of the application."*

We have perused the record of the Committee. We agree with the appellant's counsel that the complaint against him was presented to the Chairman as a letter. However, the Committee met for the first time on 17/6/2014

in the absence of parties and none of them was notified of that sitting. It was then that the Committee directed:

> *"A formal application be brought. Let the applicant be informed accordingly"*

It was on the basis of this directive that a formal application was brought under Rule 3 of the Advocates (Disciplinary and Other Proceedings) Rules. It was brought under the hand of the complainant/first respondent. The Application was dully supported by an affidavit as provided by the law. The only the thing which is missing is the addressee but we do not see any injustice caused by that omission because the Secretary received and signed the affidavit as evidenced at page 5 of the complainant's affidavit which was presented for filing on 29th day of August 2014. On the basis of this record, we have no doubt that the application was presented to and received/signed by the Secretary to the Advocates Committee.

As submitted by the learned Senior State Attorney, we agree that the cited case of **RUTAGATINA** (supra) is highly distinguishable with the present case for one main reason. In the **Rutagatina's** case there was no application and /or affidavit before the Committee. But in the case at hand, the

requirements were fulfilled. Thus, this reference is irrelevant to the circumstances of the present appeal.

In ground no.4, Mr.Thadeo submitted that the proceedings are irregular and nullity for drawing issues at the stage of composing the Ruling. He argued that the issues drawn by the Committee at that stage are contrary to Order XIV Rule 1 (5) of the Civil Procedure Code, Cap 33 R.E. 2002. To amplify this point, he cited the cases of **(1) Abdallah Hassan Vs Juma Hamisi Sekiboko, Civil Appeal no. 22 of 2007 (Unreported)(CAT); (II) Kapapa Kumpindi Vs The Plant Manager, Tanzania Breweries LTD, Civil Appeal no. 32 of 2010 (CAT) (Unreported); (III) Peoples Bank of Zanzibar Vs Suleman Haji Suleman [2000] T.L.R 347.** The learned counsel opined that, had the Committee found that it was necessary to frame issues then, parties were to be recalled to address them.

The appellant's counsel submitted that grounds 5 and 6 are connected to ground no.4. He contended that failure to afford the appellant full right to be heard on the issues raised at the stage of composing the Ruling was contrary to the rules of natural justice and has violated Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977. In this

respect, the court was referred to the decisions in **(i) Edwin Wilia Sheto vs. Managing Director of Arusha International Conference Centre [1999] T.L.R.139; (ii) DPP Vs Sabini Inyasi Tesha and Another [1993] T.L.R 237;**

(iii) Peter Ng'homango V. A.G, Civil Appeal no. 114 of 2011 (CAT) (Unreported).

(v) Halima Hassan Marealle Vs Parastatal Sector Reform Commission and Another, Civil Application no. 81 of 1991 (Unreported).

Responding to the above arguments the respondents submitted that there was no any injustice caused for not drawing the issues at the commencement of the hearing. Mr Mwitasi submitted that, the appellant knew about the allegations levelled against him and he filed his counter-affidavit and annextures. He therefore disputed the argument that the appellant was denied the right of hearing on the issues raised in the Ruling because the issues were relevant to the evidence received. The learned State Attorney added that, the proceedings before the Committee are guided by rules under GN No. 135 of 1955 and not the Civil Procedure Code. He concluded by urging the court to employ its powers and remit the matter back to the Committee for retrial in the event it finds that there was

fatal irregularity. He added that, the complaint to the Committee was genuinely presented and the irregularity, if any, affects both parties.

First and foremost, we agree with the appellant's submissions that, triable issues must be framed before the commencement of trials. This is the legal requirement under Order XIV Rule 1(5) of the Civil Procedure Code, Cap 33 RE 2002. All the cases cited by the appellant's learned counsel stress on this mandatory requirement in civil cases. See: **Abdallah Hassan Vs Juma Hamis Sekiboko** (supra) on this principle.

However, we decline to agree with the appellant's argument that it was mandatory for the Committee to frame issues when hearing the complaint. In its proceedings, the Advocates Committee is guided by **The Advocates' Act Cap 341 RE 2002** and the **Advocates (Displinary and Other Proceedings) Rules GN no. 134 of 1955.** There is no provision either in the main Act or in the Rules which provides the exact procedure to be followed by the Committee when hearing an application. Moreover, we must express here that in our research we did not come across the **proceedings of any application** where the Committee framed issues. However, it is common understanding that in applications supported by

affidavits, the issues are drawn by the court when determining the prayers sought in such applications. In the present case it is true the issues were framed by the Committee at page 8 of the typed Ruling. From the wording of the Ruling, the issues were framed in order to guide the Committee. The record says:

> *"With the above material at hand and in order to bring ourselves to focused attention, we frame five issues . . ."*

Thus, the framed issues were based on the material evidence received by the Committee. With this in mind, we disagree with Mr Revocatus Thadeo that the appellant was denied the right to be heard on those issues. This Court had a chance to go through the application and affidavit filed by the complainant, the first respondent. Indeed, all the issues framed by the Committee were deponed in his affidavit and the appellant filed his counter-affidavit by either taking note of some facts, or denying some of them and giving additional facts to dispute the deponed facts. Again, when narrating before the Committee on 24th and 25th March 2015, the parties repeated the evidence touching on the fees payable to the appellant; Deed of settlement and its enforcement; the payments received by the appellant from the judgment

debtor; and the conduct of instituting a suit against the complainant. These issues cannot be treated as something new to affect the rights of the appellant. He testified on the basis of the complaints and affidavit which in fact contained all these issues.

We wish at this juncture, to cite with acknowledgement the wisdom of our learned brother in the case of **Mulbadaw Village Council and 67 others vs National Agricultural and Food Corporation [1984] TLR 15.** In this case although other issues were framed at the commencement of trial, one issue was not framed at the beginning but evidence was received during cross-examination and the defence counsel raised it again in his final submissions. The Court at page 17 held that:

> ***"Although these arguments were not framed as issues*** *at the beginning they* ***are issues apparent from the pleadings, the evidence on record and the submissions of the both counsel."***
>
> *(Emphasis added)*

It is our firm position that the issues framed by the Committee when composing the Ruling were all apparent from the affidavit and counter affidavit and the evidence

adduced at the hearing by both parties. Hence, this ground of appeal lacks merit and is dismissed.

The appellant's advocate attacked the Committee in ground 7&8 by submitting that the testimony of the 1st respondent was not supported by documentary evidence (Deed of settlement and cheques) and all what is on record is hearsay. The learned advocate contended that the alleged exhibits referred to in the Ruling were attached to the pleadings but were never tendered as exhibits during trial. He argued that as long as the attachments were not tendered at trial they could not be relied upon by the Committee. The counsel cited the case of **(1) Japan International Cooperation Agency (JICA) vs Khakir Complex [2006] T.L.R. 343; Mwajuma Mbegu vs Kitwana Amani, Civil Appeal no. 12 of 2001, (CAT) (Unreported).**

The appellant concluded his submissions by stating that the procedure to admit the documentary evidence was not followed and thus, the appellant was convicted on the basis of suspicion. For this reason, he added, the appellant was convicted and sentenced without proof. In addition, the counsel argued that even the punishment of five years suspending the appellant from practicing as advocate is

excessive. He urged this court to set aside the findings of the Committee and set free the appellant.

The first respondent was very brief that he presented his case to the Committee and 4 cheques (exhibits) were attached to his affidavit. He also stated that one cheque was produced by the appellant and the hearing before the Committee was for the legality of those payments received by the appellant.

On the other hand, Mr Mwitasi, learned counsel for the second respondent submitted that, the complaint against the appellant was proved to the standard required. He reiterated that the contents of the documents in dispute, that is, the Affidavit and Deed of Agreement, are not disputed but the appellant is challenging their status in evidence. The learned state attorney distinguished the cases cited by Mr Thadeo by stating that, they all fall/apply to pleadings while the present appeal was based on affidavits. He contended that since an affidavit is evidence, then even the annexture to the affidavit forms part of the evidence.

As for the evidence on record, the learned State Attorney submitted that there is sufficient evidence and proof that the appellant was the advocate for the first

respondent who prepared the Deed of Settlement. He added that, the appellant received the cheques from the sister company of the judgment-debtor and the contact person and manager of the two companies was the same person. Moreover, the counsel submitted that the appellant intentionally retained the money which was intended for his client (the 1st respondent) because while his fair payment was Tshs 6 million, the cheques were for Tshs 32 million.

As for the sentence, the learned state attorney submitted that it was fair because the Committee had considered several factors before coming up with such punishment. He was of the views that, given the circumstances and the misconduct committed, the appellant should have been terminated from the bar as an advocate. The learned counsel urged the court to vary the decision of the Committee and order that the money be paid in favour of the first respondent for his retirement benefits.

We wish to note at this juncture that it is true the documents relied upon by the Committee were not admitted, numbered and/or signed by the Committee when the parties testified. However, we decline to agree with Mr Revocatus Thadeo that the omission was fatal to the

proceedings. It must be stressed here that the proceedings were not *per-se* a hearing of a civil suit initiated by a plaint and annextures under the Civil Procedure Code, Cap 33 R.E.2002. The complaint to the Committee was both an **application** to remove the name of the appellant from the Roll; and also **an allegation of Professional misconduct.** Under the provisions of Section 12 of the Advocates Act, Cap 341, RE 2002, the complainant is required to support the allegations by an affidavit setting out the facts on which he relies as proof of misconduct. The advocate complained against must also file his counter affidavit. This procedure was followed accordingly. In addition, the complainant and the appellant annexed documents which formed part of the affidavit or counter affidavit respectively. All the documents referred to in the affidavits are in the original file. It is our considered view that, those documents were part of the evidence (in the form of affidavit/counter affidavit) and this may explain the reason why the parties did not file a fresh list of documents to be relied upon at the hearing as the notices sent to them indicated. Moreover, the contents of the annexed documents were never in dispute by either party and indeed, in their oral testimonies to the Committee, the parties were referring to the facts stated in those documents. It is therefore our considered view that the

cases cited to us are relevant in the case where documents were not part of the evidence, a situation which is different and does not apply to the present matter.

On the issue of proof, the appellant's submission is that the allegations were not proved beyond reasonable doubt. The main reason given is that since the documents were not legally admitted into evidence then the Committee relied on them errenously. As we have already pointed out above, the annextures were part of the evidence in the affidavits. We also noted that there was no objection in respect of their legality so as to require the Committee to decide on the status of those documents. The argument that the Committee acted on suspicion is baseless because the evidence in the affidavit together with the oral evidence were both considered by the Committee in deciding the complaint. Being the first appellate court, we have read the evidence on record and do not find any good ground to differ with the findings of the Committee. Again, the cases referred to by the appellant do not apply and are all distinguishable.

We wish to reiterate the wisdom of the Supreme Court of South Africa in the case of **Vassen V. Law Society of Cape of Good Hope 1998 (4) SA** 532 SCA at 538 that

". . . it must be born in mind that the profession of an attorney, as of any other officer of the court, is an honourable one and as such demands complete honesty, reliability and integrity from its members . . . A client who entrusts his affairs to an attorney must be able rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. . . . "

The same standards are stressed yet in another case of **Kėkana Vs Society of Advocates of South Africa (1998) (4) SA 649 (SAC) 551- 656** where the same Court held

". . . that an advocate, whose calling is one which is praiseworthy and necessary to human life, should always cling to the famous principle that ***the true jurist is an honest man.*** *These Qualities of honesty and integrity must continue to be displayed throughout a legal practitioner's career . . . ."*

In the present appeal, there is evidence showing how the appellant handled his client especially after signing the out of court settlement. There is no doubt that since the appellant was the advocate for the first respondent, was expected and entrusted to execute the settlement terms. Contrary to those expectations, the appellant sued his own client and blocked the execution of a judgment and decree obtained by himself when representing the same client. This is the reason we support the findings of the Committee that the appellant committed unethical and a grave professional misconduct for doing so. There was proof beyond reasonable doubt on this complaint. Our position is based on the definition of proof beyond reasonable doubt as stated in the case of **Magendo Paul and Another vs Republic** [1993] TLR 219,that

> *"If the evidence is so strong against an accused so as to leave only a remote possibility in his favour which can easily be dismissed, the case is proved beyond reasonable doubt."*

We now turn to the last issue in regard to the imposed sentence. While the appellant considered the suspension of five years to be too harsh, the respondents are firm that it was

a fair sentence in the circumstances of the misconduct committed by the appellant. When Mr. Revocatus was asked to address us on the proper sentence, in his view he lowered the term of five years to at least six or twelve months.

Given the extent of professional misconduct displayed in this case, we join hands with the Committee that an advocate who had breached the oath of his office deserves a commensurate sentence. Mr Mwitasi was of the view that, the Committee should have removed the name of the appellant from the Roll of advocates and not suspending his services. We are well aware that an appellate court should not interfere with the punishment of the trial court unless there are very special reasons to do so. In this case, we do not have such reasons to interfere with the punishment pronounced by the Committee. We therefore confirm that sentence.

In the upshot and for the foregoing reasons, we dismiss the appeal with costs.

R.A.TEEMBA
JUDGE

B.R.MUTUNGI
JUDGE

I. ARUFANI
JUDGE

22/02/2018